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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN ASHCROFT, Attorney General of the State of Missouri, and RALPH L. MARTIN, Prosecuting Attorney of Jackson County, Missouri,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., NAIM S. KASSAR, M.D., REPRODUCTIVE HEALTH SERVICES, and ALLEN S. PALMER, D.O.,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN ASHCROFT
Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General

Broadway State Office Building
P.O. Box 899
Jefferson City, Missouri 65102-0899
314-751-3321

Attorneys for Cross-Petitioners.

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KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Missouri may require by statute that every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

2. Whether the State of Missouri may require by statute the attendance of a second physician, in addition to the primary surgeon, before an abortion of a viable fetus may be performed.

3. Whether the State of Missouri may require by statute that a tissue sample be taken of every abortion and submitted to a qualified pathologist for a pathology report.

4. Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. § 1988, should be proportioned to accurately reflect the extent to which a plaintiff prevails.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OFFICIAL REPORTS OF OPINIONS BELOW

The primary decision of the United States District Court for the Western District of Missouri is reported at 483 F.Supp. 679 (W.D.Mo. 1980).

The interlocutory opinion of the United States Court of Appeals for the Eighth Circuit is reported at 655 F.2d 848 (8th Cir. 1981).

The opinion on remand of the District Court is unreported.

The supplemental opinion of the Eighth Circuit, making the judgment of the Court of Appeals final, is reported at 664 F.2d 687 (8th Cir. 1981).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit sought to be reviewed was issued and filed on November 30, 1981. That final judgment incorporated specific findings and conclusions of a prior interlocutory judgment filed on July 8, 1981. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28 U.S.C. §§ 1254(1) and 2101(c). This cross-petition for certiorari does not depend upon the provisions of Supreme Court Rule 19.5 for purposes of timeliness, but is filed in full accordance with Supreme Court Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 U.S.C. § 1988:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect;

but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Missouri Revised Statutes, § 188.025:

"Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital."

Missouri Revised Statutes, § 188.030.3:

"An abortion of a viable unborn child shall be performed or induced only where there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this

section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman."

Missouri Revised Statutes, § 188.047:

"A representative sample of tissue removed at the time of abortion shall be submitted to board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record."

STATEMENT OF THE CASE

On June 29, 1979, the Governor of the State of Missouri signed into law fifteen new sections of a comprehensive statutory scheme relating to the subject of abortion. On June 30, 1979, the plaintiffs filed their complaint in the United States District Court for the Western District of Missouri challenging, as unconstitutional, nine sections of the new law. The challenged sections of the legislation were: Section 188.020, providing that only licensed physicians may perform abortions; Section 188.025, providing that abortions after twelve weeks gestation must be performed in a hospital; Section 188.028, regulating abortion services for minors; Section 188.030, regulating abortions after viability of the unborn child; Section 188.039, providing for informed consent to abortion, including the requirement that certain facts be related by the attending physician to his abortion client; Section 188.047, requiring a pathology report after an abortion; Section 188.052, providing for the

collection and submission of abortion and complication reports for statistical purposes; Section 188.063, regulating abortion counseling; Section 188.075, providing a criminal penalty for violations of the Act. This cross-petition for certiorari is addressed to the invalidation by the United States Court of Appeals for the Eighth Circuit of the second trimester hospitalization requirement (Section 188.025); of the requirement that a second physician be in attendance at the abortion of a viable fetus (Section 188.030.3); of the requirement that a representative tissue sample be examined by a pathologist after each abortion (Section 188.047); and the approval by the Eighth Circuit of a District Court award of attorneys' fees and costs in the amount of $22,037.73.

The plaintiffs have already filed a petition for writ of certiorari challenging that portion of the judgment of the Eighth Circuit upholding Section 188.028 relating to parental or judicial consent respecting abortions performed on minors.

The Court of Appeals, affirming the District Court, found that the requirement of Section 188.025 that all second trimester abortions be performed in hospitals was unconstitutional. That conclusion was based upon the factual finding of the District Court that early second trimester abortions performed by the dilatation and evacuation method can be performed as safely in non-hospital settings (Appendix at 115-119). All experts, including those testifying on behalf of plaintiffs, agreed at the trial of this matter before the District Court that methods of second trimester abortion other than dilatation and evacuation, the installation of saline, prostaglandins, urea or combinations, thereof or hysterotomies, should in all cases be performed in hospitals. For the latest year in which statistics are available on a national basis, 1978, 49% or almost half of all second

trimester abortions were performed by methods other than dilatation and evacuation.

Further, abortion surveillance statistics maintained by the National Centers for Disease Control indicate that the risk of abortion to the health and well-being of a pregnant woman increase dramatically in proportion to the weeks of gestation, a view shared by all experts testifying. Upon remand of this case to the District Court, Dr. Willard Cates, the Chief of the Abortion Surveillance Branch of the Family Planning Evaluation Division of the National Centers for Disease Control, testified by deposition to his belief that abortions performed by means of dilatation and evacuation between the thirteen and fifteen weeks of pregnancy may be performed as safely in clinics as in hospitals. When Dr. Cates' deposition testimony is adjusted to account for the difference between last menstural period and conception for purposes of calculating trimeters, it becomes clear that abortions performed by dilatation and evacuation after the thirteenth week of pregnancy, as gestation is measured by Missouri law, should be performed in hospitals. Only one week of the second trimester, therefore, is recommended for D & E procedures outside of hospitals.

Combined with the unrebutted factual testimony that those 50% of second trimester abortions not performed by means of dilatation and evacuation absolutely mandate hospital procedures, the danger of even D&E procedures beyond the very early stages of the second trimester makes it clear that the Missouri requirement that all abortions performed after 12 weeks of gestation be performed in hospitals promotes maternal health. The plaintiffs attempted to prove that abortions performed during the early stages of the second trimester, in specific abortion clinics maintained by them, by means of dilatation and evacuation, were as safe as similar abortions performed in hospitals. The plaintiffs did not attempt to prove that abortions per-

formed by other methods could be done as safely in clinics as in hospitals, that D&E procedures could be performed as safely in clinics as in hospitals during the late stages of the second trimester, or that abortions performed in all clinics, in doctor offices, or at the home of the patient could be performed as safely as abortions performed in hospital settings. The record available to the District Court and to the Court of Appeals clearly established that Missouri's second trimester hospitalization requirement was reasonably related to the State's interest in promoting maternal health.

The Court of Appeals affirmed the District Court by invalidating the requirement that Section 188.030.3 requiring the attendance of a second physician during the abortion of a viable fetus. The Court held that this statutory section was overbroad because it would require the attendance of a second physician on those occasions when a D&E procedure was performed on a viable fetus, even though in such case there is no chance of fetal survival (Appendix at 82-84). The evidence available before the District Court and the Court of Appeals was overwhelming that D&E is not the procedure of choice after viability. The only evidence presented at trial that D&E could be the procedure of choice after viability was given by Dr. Robert Crist, an expert retained by the plaintiffs. Dr. Crist also testified that he believes his female patients have the right not only to be rid of an unwanted pregnancy, but to a dead fetus as well (Tr. 431), and that he never attempts to save the fetus in abortion cases (Tr. 431, 435). What more convincing proof of the need for a second physician could be offered? All other experts who testified during the trial of this case were unanimous in their belief that dilatation and evacuation procedures should not be used during the latter stages of the second trimester where a chance of a viable fetus existed. The invalidation of this statutory section by the District Court, as affirmed by the Court of Appeals,